IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 404

BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN, OCEAN LODGE, No. 76, PORT NORFOLK LODGE, No. 775, W. M. MUNDEN,
Petitioners,

vs.

TOM TUNSTALL, NORFOLK SOUTHERN RAILWAY COMPANY,
Respondents.

BRIEF IN OPPOSITION TO GRANT OF A WRIT OF CERTIORARI

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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO GRANT OF WRIT OF CERTIORARI

PRELIMINARY STATEMENT

There are two briefs to be answered by respondent: first, the brief of petitioner Brotherhood of Locomotive Firemen & Enginemen, and second, the brief of the Seaboard Air Line Railroad Company, *amicus curiae.*

Respondent will deal in Part I with the brief of the Brotherhood, and in Part II with the brief of the Seaboard Air Line Railroad Company as *amicus curiae.*

PART I. OPPOSITION TO BRIEF OF BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN.

Respondent Tom Tunstall files this brief in opposition to grant of the writ of certiorari sought by the Brotherhood of Locomotive Firemen and Enginemen and shows that the

principles of law governing this case have already been clearly enunciated by this Court on a former hearing;

> See *Steel v. Louisville & Nashville R.R. Co., et al.*, 323 U. S. 192, *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, et al.*, 323 U. S. 210

There is no issue undisposed of for this Court to hear.

This case has been going through the courts for more than five years:

> *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, et al.*, 140 F. (2d) 35 (CCA, 4th); *Same*, 323 U. S. 210; *Same*, 148 F. (2d) 403 (CCA, 4th); *Same*, 69 F. Supp. 826 (Dist. Ct., E. D. Va.)
>
> *Brotherhood of Locomotive Firemen & Enginemen, et al., v. Tunstall*, 163 F. (2d) 289 (CCA, 4th); *Same*, U. S. Sup. Ct., October Term, 1947, No. 404.

It is being prolonged to wear down financially the plaintiff and the class he represents. With over a hundred thousand members the Brotherhood can finance this litigation indefinitely to hold off compliance with the law and with its plain fiduciary duty as bargaining agent under the Railway Labor Act. The litigation should be brought to an end.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals, Fourth Circuit, is reported in 163 F. (2d) 289 and that of the District Court in 69 F. Supp. 826, as noted above.

JURISDICTION

The jurisdiction of this Court under Section 240a of the Judicial Code as amended by the Act of February 13, 1925 is conceded.

STATEMENT OF FACTS

Petitioner highjumps the basic facts concerning formulation and service of its Notice of March 28, 1940 on the carriers, the method of negotiation of the Agreement of February 18, 1941 and Supplementary Agreement of May 23, 1941. The issue here of misrepresentation of minority workers depends on these facts.

Background

Respondent Tunstall is a Negro locomotive fireman employed on the Norfolk Southern Railway Company (hereinafter called the Norfolk Southern).

By custom railroads in the United States never employ Negroes as locomotive engineers. They draw a large percentage of their engineers by promoting white firemen [1] to engineers, after the white firemen have qualified as engineers through promotional examinations. From this fact universal usage on railroads has designated Negro firemen as "non-promotable," to distinguish them from white firemen who are known as "promotable firemen." All white firemen *ab initio* and until they have failed or waived their promotional examination are known as "promotable firemen." Negroes throughout their service remain "non-promotable firemen" designated as such.

The duties of promotable and non-promotable firemen, *as firemen*, are identical in every respect. The promotional examinations taken by the white firemen have no bearing on their duties as firemen, but are concerned solely *with qualifying the white firemen as an engineer*. Even on railroads which penalize the white fireman who fails his promotional examination three times by dismissal from the service or loss of seniority, the penalty is imposed, *regard-*

[1] A white or Negro fireman serving on a Diesel electric locomotive or on any locomotive using other than steam power is known as a helper. (See R. 14).

less how efficient he might be as a firemen, because he is not good engineer material. Promotion to engineer does not change the fireman's status on the firemen's seniority roster; it merely puts him for the first time on the engineer's seniority roster. Thereafter he is carried on both seniority rosters.

Petitioner Brotherhood of Locomotive Firemen & Enginemen (hereinafter called the Brotherhood) draws its membership from white locomotive firemen and white locomotive engineers. Negroes are barred from membership solely because of color. At all times material the Brotherhood has been and still is the collective bargaining representative under the Railway Labor Act for the entire craft or class of locomotive firemen (including the non-member Negro firemen) on the Norfolk Southern and all the other railroads covered by the Notice of March 28, 1940 (R. 11: Appendix 25). The Negro firemen constitute the minority members of the craft.

Notice of March 28, 1940 (R. 11, Appendix 25)

Without warning to the non-member Negro firemen, with no notice or opportunity afforded them to be heard, the Brotherhood acting as sole bargaining representative under the Railway Labor Act of the entire craft or class of firemen on 21 Southeastern railroads under date of March 28, 1940 served on the railroads a notice to modify existing working agreements covering locomotive firemen as follows:

> "1. Only promotable men will be employed for service as locomotive firemen or for service as helpers on other than steam power.
>
> "2. When new runs or jobs are established in any service, only promotable firemen or helpers will be assigned to them.
>
> "3. When permanent vacancies occur on established runs or jobs in any service, only promotable firemen or helpers will be assigned to them.

"4. It is understood that promotable firemen, or helpers on other than steam power, are those who are in line for promotion under the present rules and practices to the position of locomotive engineer."

As this was a regional wide movement the Brotherhood requested the carriers to pool together and form a conference committee "to represent them in dealing with this subject." (R. 13). The carriers' conference committee was formed as requested.

No Negro fireman was ever notified the Notice had been served.

Consummation of Agreement February 18, 1941

Whenever it was able, the Brotherhood negotiated an agreement with an acquiescent carrier in the exact terms proposed by the Notice of March 28, 1940 (e.g., Agreement, October 8, 1940, with the Frankfort & Cincinnati Railroad Co., R. 73).

Generally however the carriers refused to accede to the Brotherhood proposals, and on January 15, 1941 the carriers' conference committee rejected the proposals by letter stating in part:

"* * * * *

"With respect to Item 1—that only promotable men will be employed for service as locomotive firemen or for service as helpers on other than steam power: As we understand this propsal, it is that the Carriers parties to the conference obligate themselves that they will in future hire no nonpromotable men. The effect of this would be to exclude from employment in our service perhaps a small number of white persons who, because of educational qualifications or physical handicaps, might not be promotable, and, in addition, would exclude from employment all colored persons, because, upon the properties represented by this Committee, colored employees are not promotable to position of engineer. In our conference we endeavored to point out

to you that we doubted the wisdom and fairness of making any such agreement as this, first, because it would restrict the field from which we might draw employees in the event of a labor shortage, and second, because we did not feel that such a large proportion of the population of the territory which we serve should be completely banned from employment as firemen upon our properties. As we said to you, these people are citizens of the Country; it is necessary that they make a living; colored people are patrons of the railroads, and, in our opinion, we should not by agreement entirely exclude them from employment in positions which they have occupied and filled over the years.

"With respect to Items 2, 3 and 4 of your letter: We pointed out to you that this proposal would have the effect of severing from our employment men who have rendered faithful and valuable service for many years, would violate established seniority rights, and would doubtless subject the Carriers to a multiplicity of litigation. We feel very strongly, as we told you, that we have neither the moral nor the legal right to agree to Items 2 and 3, and could not favorably consider them.

"For the above considerations, you are advised that your entire proposal is respectfully declined." (R. 42).

Thereupon the Brotherhood invoked the services of the National Mediation Board to assist it in its attempt to drive through its proposal. It accused the Carriers of injecting the race issue into the picture. The Carriers' Committee January 16, 1941 replied: ". . . we say that the race question is obviously inherent in your proposal . . ." (R. 84).

On February 18, 1941 the Brotherhood with the assistance of the National Mediation Board obtained the compromise agreement which respondent Tunstall attacks. This Agreement known as the Southeastern Carriers Conference Agreement, provides among other things:

"(1) On each railroad party hereto the proportion of non-promotable firemen and helpers on other than steam power, shall not exceed fifty per cent in each class of service established as such on each individual carrier. This agreement does not sanction the employ-

ment of non-promotable men on any seniority district on which non-promotable men are not now employed.

"(2) The above percentage shall be reached as follows:

"(a) Until such percentage is reached on any seniority district only promotable men will be hired.

"(b) Until such percentage is reached on any seniority district all new runs and all vacancies created by death, dismissal, resignation or disqualification shall be filled by promotable men. A change in the starting time of the same run or job will not be considered as constituting a new run.

"* * * * *

"(4) It is understood that promotable firemen, or helpers on other than steam power, are those who are in line for promotion under the present rules and practices to the position of locomotive engineer.

"* * * * *

"(7) It is expressly understood that in making this agreement representatives of the employees do not waive and are in no way prejudiced in the right to request agreements on the individual carriers here represented which will restrict the employment of helpers on other than steam power to promotable men; and it is agreed that this question is to be negotiated to a conclusion with the individual carriers." (R. 13).

Neither respondent nor any Negro fireman was given any notice, opportunity to be heard, or any report concerning the negotiations, the invocation of the services of the National Mediation Board, the consummation of the Agreement or its terms.

Supplementary Agreement of May 23, 1941

Thereafter the Brotherhood as bargaining representative under the Railway Labor Act for the entire craft of firemen on the Norfolk Southern, on May 23, 1941 negotiated a supplementary agreement interpreting the main Agreement

of February 18, 1941. This supplementary agreement among other things provided:

> "* * * * *
>
> "It is understood and agreed that the phrase '—non-promotable fireman—' carried in paragraph 1 of the above quoted agreement refers only to colored firemen.
>
> "It is agreed that promotable firemen now in the service who are physically qualified and not otherwise restricted, who have heretofore been called for examination for promotion and failed, or who have waived promotion, will be called for examination for promotion between May 1, and May 15, 1942. In the event such firemen fail to pass examination for promotion, or waive examination, their seniority as firemen shall not be affected." (R. 19).

Neither respondent nor any Negro fireman was given any notice or opportunity to be heard in connection with the proposal for or negotiation and consummation of the Supplementary Agreement; nor was its existence reported in any way.

Effect on Tunstall's Job

In June, 1941, respondent, Tunstall, was fireman on a passenger run between Norfolk, Virginia and Marsden, North Carolina, which he held by virtue of his seniority. He worked the run competently and to the satisfaction of his employer, the Norfolk Southern, until about October 10, 1941 when the Brotherhood asserted his assignment violated the terms of the Agreement of February 18, 1941 and Supplementary Agreement of May 23, 1941 and caused him to be replaced with a Brotherhood member with less seniority than his. Tunstall was forced to accept less desirable work and longer hours on a yard freight job. It was not until he was removed from his assignment that Tunstall had any knowledge of the Agreement or Supplementary Agreement above, and then the advice came from the carrier.

Upon learning of the Agreements Tunstall requested the Norfolk Southern to restore him to his run and seniority rights but the Norfolk Southern referred him to the craft's representative, the Brotherhood. Thereupon Tunstall requested the Brotherhood to represent him and to restore him to his run and seniority rights but his request was ignored. He then filed his action for injunction, declaratory judgment and damages.

Course of the Litigation

As an opener defendants all filed motions to dismiss Tunstall's complaint. The District Court ruled it had jurisdiction over the persons of the defendants but no jurisdiction over the subject matter, and dismissed the complaint. The Circuit Court of Appeals, Fourth Circuit, affirmed on the ground of no jurisdiction over the subject matter, but did not dispose of the question of personal jurisdiction (140 F. 2d 35). On certiorari, this Court reversed, holding there was Federal jurisdiction and remanded the case to the Circuit Court of Appeals for further consideration of the question of jurisdiction over the persons of the defendants (323 U. S. 210). The Circuit Court of Appeals affirmed the judgment of the District Court that it had acquired jurisdiction over the persons of the defendants, and remanded the case to the District Court for further proceedings (148 F. 2d 403).

After taking the deposition of the Secretary of the National Mediation Board, and obtaining certain admissions from each defendant, respondent Tunstall moved for summary judgment. Defendant Brotherhood filed certain affidavits and exhibits; then both the Brotherhood and the Norfolk Southern moved for summary judgment. The District Court gave judgment for Tunstall as set forth on pages 33 to 35 of the Transcript of Record herein and continued the case for assessment of damages, which were assessed by a jury at $1,000.00. (R. 36).

No material facts are in dispute. The Brotherhood does not deny it bars Negroes from membership because of color; does not deny the Notice of March 28, 1940, the negotiations as set forth above resulting in the Agreement of February 18, 1941 and the Supplementary Agreement of May 23, 1941. It admits it gave the Negro firemen no notice, no opportunity to be heard, no report at any stage. It does not deny it forced the Norfolk Southern to remove respondent from his job and replace him with a Brotherhood member holding less seniority than he has.

The judgment of the District Court declared the Brotherhood to be under the duty of representing the non-union or minority union members of the craft without hostile discrimination, fairly, impartially and in good faith; that in serving the Notice of March 28, 1940 and negotiating the Agreements of February 18, 1941 and May 23, 1941, and in compelling the Norfolk Southern to replace Tunstall with a Brotherhood member it violated its duty and reaped an illegal benefit; that the said Agreements are void, do not bind the Negro firemen, and that the Brotherhood and Norfolk Southern are not entitled to take any benefits therefrom, and that Tunstall is entitled to be restored to his job.

The judgment further provides:

> "3. That the defendant Brotherhood of Locomotive Firemen & Enginemen, Ocean Lodge No. 76, Port Norfolk Lodge No. 775, and W. M. Munden and the class they represent, and the defendant Norfolk Southern Railway Company, be and each of them hereby is perpetually enjoined from enforcing or otherwise recognizing the binding effect of said 'Southeastern Carriers Conference Agreement' of February 18, 1941 or the Supplemental Agreement of May 23, 1941 in so far as said Agreement or Supplementary Agreement deprives plaintiff of his assignment on the passenger run between Norfolk, Virginia, and Marsden, North Carolina, or in any other way interferes with his occupation as a locomotive fireman employed by the defendant Railway or in any way interferes with the occupation

of the class he represents as locomotive fireman employed by the defendant Railway.

"4. That the defendant Norfolk Southern Railway Company be, and it is hereby directed to restore plaintiff to his seniority rights to apply for assignment to the run as locomotive fireman on the passenger run between Norfolk, Virginia, and Marsden, North Carolina from which he was illegally displaced on or about October 10, 1941, in accordance with the rules and working conditions governing locomotive firemen employed by it, irrespective of the alleged operation of said 'Southeastern Carriers Agreement' and Supplemental Agreement, and the position of locomotive fireman on said run is hereby declared vacant if now held by a member of the defendant Brotherhood or other locomotive fireman with less seniority than plaintiff, should plaintiff desire to apply for assignment to said run." (R. 34-35).

Leave was reserved to any party in interest to apply for amendment, modification or enlargement of the judgment after reasonable notice. (R. 35). Neither the Brotherhood nor the Norfolk Southern has made any such application.

On appeal the Circuit Court of Appeals, Fourth Circuit, affirmed (163 F. 2d 289). The Brotherhood now petitions this Court for a writ of certiarari.

QUESTIONS PRESENTED

It is respectfully submitted that Questions One and Two presented by Petitioners (whether the Railway Labor Act prevents the Brotherhood from alleviating the employment conditions of the promotable firemen caused by the presence of large numbers of non-promotable firemen, by restricting the assignment rights of non-promotable firemen) are irrelevant; and that Question 3 (whether the Brotherhood is liable in damages to a fireman aggrieved by its breach of duty as that fireman's collective bargaining agent under the Railway Labor Act) has been answered by this Court in the Steele case (323 U. S. 192) which is a com-

panion case to the Tunstall case, involving the same Brotherhood and the same basic Agreement of February 18, 1941, on another carrer — the Louisville & Nashville Railroad Company.

Respondent Tunstall respectfully submits that there is no question open on this record which has not been disposed of by this Court.

SUMMARY OF ARGUMENT

The argument of alleged hardship on promotable firemen is untenable and irrelevant and is raised at the wrong time and in the wrong forum.

The purpose and intent of the Brotherhood are to be found from its actions, its proposals and methods used to secure adoption of the proposals. It cannot now claim that it never intended to eliminate the non-promotable firemen simply because the carriers refused to submit to the proposal as submitted.

Even if it were true that the presence of a large number of non-promotable firemen makes the working conditions of the promotable firemen burdensome, the Brotherhood in its fiduciary capacity as collective bargaining agent under the Railway Labor Act for the entire craft or class, could not resolve the situation by the elimination of the non-promotable firemen.

The Brotherhood further violated its fiduciary duty by not giving the non-promotable firemen notice and opportunity to be heard.

The Brotherhood is liable in money damages to a non-promotable fireman who has suffered loss as a result of violation of its statutory fiduciary duty as his collective bargaining representative under the Railway Labor Act, as amended.

The judgment is clear, definitive and enforceable.

ARGUMENT

I

The Argument of Alleged Hardship on Promotable Firemen Is Untenable and Irrelevant; Is Raised at the Wrong Time and in the Wrong Forum

The Brotherhood states baldly that the agreements under attack in this litigation represent the Brotherhood's method of eliminating what it considered discrimination against promotable firemen caused by the presence on the southeastern carriers of a number of non-promotable firemen. It argues that because the railroads discriminate against Negroes in the hiring of *engineers* the Brotherhood can use its position as collective bargaining agent under the Railway Labor Act to destroy their rights *as firemen.*

Respondent contends that in the absence of a showing that there is any distinction between the duties of the promotable firemen and non-promotable firemen *as firemen,* the Brotherhood's argument is both irrelevant and untenable, and instead of helping the Brotherhood convicts it of using its position to discriminate against the minority non-member Negro firemen whom it was under a statutory obligation to represent fairly.

Assuming, however, for purposes of argument only that there are distinctions existing within the craft or class of firemen that necessitate special treatment for the problem of the non-promotable firemen, the place and time for thrashing out those issues were by meetings and conferences within the craft before any proposition was made to the carriers, and by providing notice and opportunity to be heard to *all* members of the craft or class. No such procedure was ever carried out by the Brotherhood, and the Brotherhood herein conveniently and purposely has drawn the curtain on all Brotherhood activity leading up to the signing of the Agreement of February 18, 1941, because it can make

no explanation of same consistent with fair and impartial representation or consistent with a lack of bias and prejudice against the Negro firemen. The Brotherhood's first position (and we submit its only true position) was that it owed no duty to the minority members of the craft or class;[2] however, after this Court had held that it was under a statutory obligation to represent *all* members of the craft fairly and impartially it then sought to find some distinction within the craft that would justify its failure to carry out that obligation.

The Railway Labor Act as amended June, 1934, established "unit Representation" of railway employees for the purposes of collective bargaining. The unit established is the "craft or class." There is no sanction in the Act itself nor in the decisions of the Courts that permits a craft representative to split the representation unit into sub-crafts or sub-classes for the benefit of one portion of the craft at the expense of the other portion or for the benefit of another craft. The men who fire steam locomotives for railroads (known as helpers on other than steam power) form a "craft or class" within the meaning of the Railway Labor Act. The duties of all locomotive firemen *as firemen* —white and Negro, promotable and non-promotable — are identical. Rates of pay and working conditions for all firemen performing the same duties within the various classes of service within the craft are the same. Promotional examinations are not required to enhance the efficiency of *firemen* nor to enable firemen to get better jobs *as firemen.* They are required solely for the purpose of determining the eligibility of a fireman to be promoted from that craft into the *craft of engineers.* If a fireman passes the promotional examination he does not improve his position as fireman; he keeps his same relative place on the firemen's seniority roster; his duties as a fireman remain the same, his rate

[2] See Brotherhood's Brief in Opposition to Certiorari, p. 12, *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, et al.,* United States Supreme Court, October Term, 1943, No. 779; Brotherhood's Brief on the merits, *same case,* pp. 27-32, October Term, 1944, No. 37.

of pay and working conditions remain the same as those for all other firemen working in his class of service. When called upon to work as an engineer, however, he leaves the craft of firemen and enters that of engineers and becomes subject to the rates of pay, rules and working conditions governing that craft, except that while working in the engineers' craft he retains his seniority in the fireman's craft and that seniority continues to accumulate in the same manner as though he had never been promoted. If demoted back to firing he re-enters the firemen's craft and takes such firing jobs as his accumulated seniority, *dating from the time he was first hired as a fireman,* entitles him to. The fact that when promoted to the craft of engineers he must enter that craft at the bottom of the engineers' seniority roster and take the less desirable engineer jobs is totally irrelevant on the question of the Brotherhood's obligation to represent all the firemen *as firemen* fairly and impartially. The very fact that the Brotherhood concerned itself with the problem of junior engineers demonstrates that it was not trying to represent the entire craft or class of firemen fairly and impartially but was concerned solely with securing advantages for its members and potential members both as firemen and as engineers by eliminating the minority non-member Negro firemen from the service.

II

The Brotherhood Breached Its Statutory Fiduciary Duty to Respondent Tunstall and the Non-Promotable Firemen by Negotiating the Agreement of February 18, 1941, and the Supplemental Agreement of May 23, 1941; by Refusing to Give Him and Them Notice and an Opportunity to Be Heard, and a Report of Acts Done; and in Displacing Him from His Job by Virtue of Said Agreements in Favor of a Brotherhood Member with Less Seniority Than His.

In spite of the Brotherhood's persistent attempt to divert attention from the basic issue involved in this case, that

issue has always been, and is, whether the record discloses that the Brotherhood violated the statutory fiduciary duty owed by it to respondent and the other Negro locomotive firemen, as sole bargaining representative under the Railway Labor Act of the entire class or craft of locomotive firemen employed by respondent railway.

The Notice of March 28, 1940, was formulated and served upon the carriers involved without any notice whatsoever to the Negro firemen and without giving them any chance to be heard. That notice proposed the elimination of *all* Negro locomotive firemen from the service of the companies involved. The Negro firemen were never advised by the Brotherhood that such proposal had been made.

The Brotherhood never sought the percentage agreement it now argues was its method of alleviating discrimination against the promotable firemen. It had to take the percentage agreement as the best it could get from the reluctant carriers. There can be no question of this fact because where one of the carriers served with the notice acquiesced it signed an agreement in the *identical* terms of the notice. (R. 73).

In using its collective power and position as statutory representative to push through its proposals that resulted in the compromise agreement of February 18, 1941, the Brotherhood did so with full knowledge that the end result would mean the serious disruption of the vested seniority rights of respondent and the other Negro firemen and with further knowledge that the railroad companies considered the Negro firemen competent employees and were opposed to their elimination. (See letter Mackay to Robertson, Jan. 15, 1941, R. 78). Even when, through indirect sources, the Negro locomotive firemen learned of the proposals and negotiations and protested same, the Brotherhood ignored their protests and refused to disclose any of its actions to them. (See letters Jan. 9, and 16, 1941, Houston to Robertson, R. 85-87).

When the Brotherhood found that the best limitation it

could get was a ceiling of fifty per cent on employment of Negroes as firemen it then provided that on any railroad having in *its* opinion rules more favorable to the promotable firemen those rules might be retained in lieu of the provisions of the agreement (R. 14); and further provided that in agreeing to the terms of the agreement of February 18, 1941, the Brotherhood was not to be prejudiced in further negotiating to restrict the employment of firemen, when used as helpers on other than steam power, solely to promotable men. (R. 15, 16).

If the record were to end at this point there would be ample proof of the Brotherhood's violation of its statutory duty within the principles announced by this Court in the Steele and Tunstall cases, *supra*. But the record shows that the Brotherhood's discriminatory action did not stop there. It negotiated with respondent Railway Company the Supplementary Agreement of May 23, 1941, setting forth in Paragraph 8, Example 2, thereof: "It is understood and agreed that the phrase '—non-promotable fireman—' carried in paragraph 1 of the above quoted agreement refers *only to colored firemen.*" (R. 19). [Emphasis supplied].

The Brotherhood would have this Court believe that its motives were pure and that its actions were directed solely towards the alleviating of the promotable firemen's problems. The following provision of the Supplemental Agreement completely disrobes the Brotherhood of this cloak of purity and exposes its real purpose:

> "It is agreed that *promotable* firemen now in the service who are physically qualified and not otherwise restricted, who have heretofore been called for examination for promotion and failed, or who have waived promotion, will be called for examination between May 1 and May 15, 1942. In the event such firemen fail to pass examination for promotion, or waive examination, their seniority *as firemen* shall not be affected." (R. 19). [Emphasis supplied].

What the Brotherhood really was doing was entrenching its position and trying to build up its membership by splitting the craft along color lines and eliminating from the service the Negroes, who under its constitution, were not eligible for membership.

As a result of the above agreements and at the Brotherhood's insistence, respondent Tom Tunstall was removed from his run and forced to accept less desirable and more arduous work in yard service, and the man who took over his job was a white fireman, member of the Brotherhood. When Tunstall requested the Brotherhood to represent him for the purpose of having his seniority and job restored the Brotherhood ignored him and would not so much as answer his letter.

All of the above-mentioned proposals and actions were made and taken by the Brotherhood without notice, opportunity to be heard, or report to the Negro members of the craft that the Brotherhood was charged with the duty of representing fairly and impartially. A clearer case of "irrelevant and invidious" discrimination based on race can scarcely be envisioned.

When this case and its companion case, *Steele* v. *L. & N. Railroad Company, et al.*, were before this Court, this Court held in the Steele Case (323 U. S. at P. 203), "The representative which thus discriminates may be enjoined from so doing, and its members may be enjoined from taking the benefit of such discriminatory action. No more is the Railroad bound by or entitled to take the benefit of a contract which the bargaining representative is prohibited by the statute from making." The cause of action alleged originally in this case stands admitted of record and no question is open which was not disposed on the previous appeal.

III

The Brotherhood Is Liable in Money Damages to a Non-Promotable Fireman Who Has Suffered Loss as a Result of the Violation of Its Statutory Fiduciary Duty to Represent Him Fairly and Impartially Under the Railway Labor Act.

In raising the question of its liability in money damages for violation of its statutory fiduciary duty the Brotherhood shows that it desires power without responsibility. The Steele case (323 U. S. 207) states:

> "We conclude that the duty which the statute imposes on a union representative of a craft to represent the interests of all its members stands on no different footing and that the statute contemplates resort to the usual judicial remedies of injunction *and award of damages* when appropriate for breach of that duty." [Emphasis supplied].

Further argument is superfluous.

IV

The Judgment Is Clear, Definitive and Enforceable

No challenge to the form of the judgment has ever been made in the District Court, the Circuit Court of Appeals or this Court by any party to the record. The first challenge to the sufficiency of the judgment on the ground of certainty and jurisdiction of the court has been imported in the case by the Seaboard's *amicus curiae* brief.

There is nothing wrong with the judgment. The theory upon which respondent Tunstall brought his case was that he accepted the fact the Brotherhood was his bargaining representative under the Railway Labor Act and complained only in the particulars wherein the Brotherhood *mis*represented him. He left the Brotherhood free to make contracts for the benefit of the craft as a whole.

Examining the Southeastern Carriers' Conference Agreement on that basis the pernicious discriminatory parts are distinct and severable from the parts of general benefit to the craft. The Agreement has three main objectives: (1) to curtail the employment and seniority rights of the non-promotable firemen already in service, (2) to provide test examinations for all firemen hired after the agreement went into effect, including a schedule of promotional examinations for promotable firemen thereafter hired, and (3) a schedule of promotional examinations for promotable firemen already in service. (R. 14-16).[3] Respondent attached only the provisions under the first objective. The Supplementary Agreement of May 23, 1941 has for its sole objective a tighter fastening on the Negro firemen of the discriminatory provisions in the Southeastern Carriers' Conference Agreement (R. 16-19). All this is plain and unmistakable from the face of the Agreements themselves.

Therefore when the Court enjoined the Brotherhood and the Norfolk Southern from recognizing or enforcing the Southeastern Carriers' Conference Agreement and the Supplementary Agreement in so far as either interferes with Tunstall's occupation as locomotive fireman or the occupation of the class he represents, all parties: Tunstall, the other Negro firemen, the Brotherhood and the Norfolk Southern knew exactly what the judgment covered. Although the Court in the judgment itself provided that any party could move for amendment, modification or enlargement of the judgment (R. 35), no such motion has ever been made.

The District Court wrote no new term of agreement for the Brotherhood and the Norfolk Southern. It excised the illegal discriminatory provisions. Everything left is the product of collective bargaining negotiations conducted under the Railway Labor Act by the proper representatives of the parties.

[3] The Notice of March 28, 1940 had only one objective—the elimination of Negro firemen in service and a prohibition against employment of any Negroes in the future.

The declaratory phase of the District Court's judgment did nothing more than restate the law as laid down by this Court in the Steele case (323 U. S. at p. 199 et seq.)

Within the limits of the interpretation of the Railway Labor Act by this Court, the District Court has left the parties free and unhampered. It has laid down no chart for future action. The parties know their rights and their limitations; their past conduct has been definitively ruled on. The judgment is enforceable as a matter of almost mechanical administration of the law.

CONCLUSION ON PART I

The Brotherhood has harped upon its professed interest in efficient and safe railroad operation before this Court and other places. The clause in the Supplementary Agreement of May 23, 1941 providing for retention of white firemen who waive or fail the promotional examinations (R. 19) unmasks this pretension. But lest the Court think this might have been a slip on the part of local Brotherhood officers on the Norfolk Southern, respondent calls attention of the Court to the provision of the Southeastern Carriers Conference Agreement itself:

> "All promotable firemen now in the service *physically qualified*, who have not heretofore been called for examination for promotion, or *who have not waived promotion*, shall be called in their turn for promotion. When so called should they decline to take such examination for promotion or fail to pass as herein provided, they shall be dropped from the service." [Emphasis supplied].

It is clear that the Brotherhood's main concern was to eliminate from the service the minority Negro firemen who were ineligible for Brotherhood membership because of race.

Respondent prays that the writ of certiorari be denied.

Part II: Reply to the Brief Amicus Curiae of the Seaboard Airline Railroad Company

The Seaboard Air Line Railroad Company brief *amicus curiae* raises objections to the injunctive relief afforded by the District Court. It argues the jurisdiction of the District Court was limited to directing the Brotherhood as collective bargaining agent

> "to give the notice required, and to proceed in accordance with the machinery of the Act with the negotiation of changes in rules and working conditions that will result in an amended contract containing no differences not relevant to its authorized purposes, within the allowable limits outlined in the opinion of this Court in the *Steele* case, *supra.*" (Brief *amicus* p. 24).

The effect of such a ruling would be to nullify completely the Steele decision which held the Southeastern Carriers Conference Agreement illegal in its discriminatory aspects. The only basis for "renegotiating" the Agreement would be on the theory the Agreement furnished a *valid operating* rule which could be changed only under the procedure of the Railway Labor Act.

Under the collective bargaining procedure of the Railway Labor Act existing agreements remain in effect through the period of notice, the period of negotiation and until a new agreement is reached (45 U. S. C., sec. 152—Seventh). Suppose the Brotherhood and the carriers never reach a new agreement, shall the Southeastern Carriers' Conference Agreement remain indefinitely in effect? That would give the Brotherhood and the carriers power to nullify the Court's decree.

The District Court did not attempt to write a contract for the Norfolk Southern and the Brotherhood. All it did was to excise the illegal portions of a contract already made by the Norfolk Southern and the Brotherhood. It was not

concerned with the promotion problem, or the working conditions of the promotable and non-promotable firemen. It was concerned solely with the abuse of statutory power by the Brotherhood in the manner set forth in its opinion (R. 25).

The Court was careful to do no more than mark out the legal limits of Brotherhood action in the premises. ~~(*Amicus* brief p. 24)~~.

~~This limitation is absurd. By the provision of the Railway Labor Act contracts remain in force during the period of notice and while negotiation is pending. The Brotherhood could stall the negotiations indefinitely. Meanwhile the Agreement which the Courts have declared illegal would remain as an operating rule governing the fireman.~~

The Courts are not running the railroads. Their function is not to instruct the carrier and the employees' representative what to do; but rather to mark out the legal limitations of permissible action under the Railway Labor Act. This was the effect of the decision.

All the other matter about the problems of the promotable firemen which the brief *amicus* attempts to raise, are addressed at the wrong time and to the wrong forum. These questions which were not aired inside the craft before the Brotherhood made its proposals cannot be injected into the litigation at this stage.

Since the District Court has not attempted to do anything except pass on what the bargaining agent has already done, the argument about the white non-promotables not having been heard is irrelevant. They should and will have their notice and opportunity to be heard within the craft before the bargaining agent goes forward, if the judgment of the District Court is upheld. Meanwhile, respondent and

the Negro firemen will have had their wrongs redressed and protection assured against hostile discrimination. As individuals they have the indefeasible right to ask redress for past wrongs.

Missouri ex rel Gaines v. Canada, 305 U. S. 337.

It is respectfully submitted the writ of certiorari should be denied.

Respectfully submitted,

CHARLES H. HOUSTON,
JOSEPH C. WADDY,
615 F Street, Northwest
Washington, D. C.
OLIVER W. HILL, JR.
623 North Third Street
Richmond, Virginia
Attorneys for Respondent,
TOM TUNSTALL.

APPENDIX

NOTICE, MARCH 28, 1940 (R. 11)

Brotherhood of Locomotive Firemen and Enginemen

General Grievance Committee

——— Railway

March 28, 1940.

Mr. ————————, ——,——

DEAR SIR:

This is to advise that the employees of the —— Railway engaged in service, represented and legislated for by the Brotherhood of Locomotive Firemen and Enginemen, have approved the presentation of request for the establishment of rules governing the employment and assignment of locomotive firemen and helpers, as follows:

1. Only promotable men will be employed for service as locomotive firemen or for service as helpers on other than steam power.

2. When new runs or jobs are established in any service, only promotable firemen or helpers will be assigned to them.

3. When permanent vacancies occur or established runs or jobs in any service, only promotable firemen or helpers will be assigned to them.

4. It is understood that promotable firemen or helpers on other than steam power are those in line for promotion under the present rules and practices to the position of locomotive engineer.

In accordance with the terms of our present agreement, and in conformity with the provisions of the Railway Labor Act, kindly accept this as the required official notice of our desire to revise the agreement to the extent indicated.

The same request is this date being presented on the following railroads:

Atlantic Coast Line
Jacksonville Terminal
Atlanta Joint Terminal
Atlanta & West Point
Western Railroad of Ala.
Central of Georgia
Frankfort & Cincinnati
Georgia Railroad
Georgia & Florida
Gulf, Mobile & Northern
Louisville & Nashville
Memphis Union Station Co.
Louisiana and Arkansas
Mobile and Ohio, Columbus & Greenville
Norfolk and Portsmouth Belt
Norfolk & Southern
Norfolk & Western
Seaboard Airline
Southern Railroad System
St. Louis-San Francisco
Tennessee Central

It is our request that all lines or divisions of railway controlled by the —— Railway shall be included in settlement of this proposal and that any agreement reached shall apply to all alike on such lines or divisions.

It is desired that reply to our proposal be made in writing to the undersigned on or before April 7, concurring therein, or fixing a date within 30 days from date of this letter when conference with you may be had for the purpose of discussing the proposal. In event settlement is not reached in conference, it is suggested that this railroad join with others in authorizing a conference committee to represent them in dealing with this subject. In submitting this proposal we desire that it be understood that all rules and conditions in our agreements not specifically affected by our proposition shall remain unchanged subject to change in the future by negotiations between the proper representatives as has been the same in the past.

Yours truly, (*Signed*) General Chairman.

AGREEMENT, FEBRUARY 18, 1941 (R. 13)

Agreement

Between the Southeastern Carriers' Conference Committee representing the

Atlantic Coast Line Railway Company
Atlanta & West Point Railroad Company and Western Railway of Alabama
Atlanta Joint Terminals
Central of Georgia Railroad Company
Georgia Railroad
Jacksonville Terminal Company
Louisville & Nashville Railroad Company
Norfolk & Portsmouth Belt Line Railroad Company
Norfolk Southern Railroad Company
St. Louis-San Francisco Railway Company
Seaboard Air Line Railway Company
Southern Railway Company (including State University Railroad Company and Northern Alabama Railway Company)
The Cincinnati, New Orleans and Texas Pacific Railway Company
The Alabama Great Southern Railroad Company (including Woodstock and Blacton Railway Company and Belt Railway Company of Chattanooga)
New Orleans and Northeastern Railroad Company
New Orleans Terminal Company
Georgia Southern and Florida Railway Company
St. Johns River Terminal Company
Harriman and Northeastern Railroad Company
Cincinnati, Burnside and Cumberland River Railway Company
Tennessee Central Railway Company

and the

Brotherhood of Locomotive Firemen and Enginemen

(1) On each railroad party hereto the proportion of

non-promotable firemen and helpers on other than steam power, shall not exceed fifty percent in each class of service established as such on each individual carrier. This agreement does not sanction the employment of non-promotable men on any seniority district on which non-promotable men are not now employed.

(2) The above percentage shall be reached as follows:

(a) Until such percentage is reached on any seniority district only promotable men will be hired.

(b) Until such percentage is reached on any seniority district all new runs and all vacancies created by death, dismissal, resignation or disqualification shall be filled by promotable men. A change in the starting time of the same run or job will not be considered as constituting a new run.

(3) Except as provided in items (2) (a) and (2) (b) men now holding seniority as firemen, or helpers on other than steam power, shall be permitted to exercise seniority in accordance with their seniority and the rules of their respective schedules.

(4) It is understood that promotable firemen, or helpers on other than steam power, are those who are in line for promotion under the present rules and practices to the position of locomotive engineer.

(5) It is understood and agreed that on any road having, in the opinion of its B. of L. F. & E. Committee, more favorable rules or conditions than above stipulated, such rules and conditions may at the option of such committee be retained in lieu of the above provisions.

(6) All persons hereafter hired as firemen shall be required, in addition showing, in the opinion of the management, reasonable proficiency, to take within stated periods to be fixed by the three years, two examinations to be prepared by management and to be applied to all alike to test

their qualifications as firemen. A fireman failing to pass either examination shall have a second trial within three months.

Firemen hereafter hired declining to take or failing to pass either of the examinations provided for in the preceding paragraph shall be dropped from the service.

Promotable firemen who pass the two examinations above referred to shall be required to take an examination for promotion to the position of engineer when they have had three and not more than four years of actual service. Upon passing such promotional examination and meeting all the requirements established by the carrier for the position of engineer, they shall, when there is need for additional engineers, be promoted to such position, and will establish a seniority date as engineer in accordance with the rules contained in the agreements on the individual railroads.

When rules for conduct of examinations for promotion are included in current schedules, such rules shall apply. In the absence of such rules firemen failing to pass will be given a second trial within a period of three months and if they fail to pass on the second trial will be given a third trial within a period of three months.

Promotable firemen declining to take examinations for promotion, or who fail in their efforts to successfully pass the same, shall be dropped from the service.

All promotable firemen now in the service physically qualified, who have not heretofore been called for examination for promotion, or who have not waived promotion, shall be called in their turn for promotion. When so called should they decline to take such examination for promotion or fail to pass as herein provided, they shall be dropped from the service.

(7) It is expressly understood that in making this agreement representatives of the employees do not waive and are in no way prejudiced in the right to request agreements on the individual carriers here represented which

will restrict the employment of helpers on other than steam power to promotable men; and it is agreed that this question is to be negotiated to a conclusion with the individual carriers.

(8) This agreement shall become effective February 22, 1941.

Signed at Washington, D. C., this 18th day of February, 1941.

For the Carriers:

Southeastern Carriers' Conference Committee, C. D. Mackay, Chairman, C. D. Mackay, H. A. Benton, C. G. Sibley, Committee Members.

For the Employees:

Brotherhood of Locomotive Firemen and Enginemen, D. B. Robertson, President; Brotherhood of Locomotive Firemen and Enginemen's Committee, W. C. Metcalfe, Chairman.

SUPPLEMENTAL AGREEMENT, MAY 23, 1941 (R. 16)

Supplementary Agreement Effective February 22, 1941, to the Agreement between the Norfolk Southern Railroad Company and the Brotherhood of Locomotive Firemen and Enginemen Dated September 1, 1928

The purpose of this supplementary agreement is to incorporate as a part of the agreement dated September 1, 1928, between the Norfolk Southern Railroad Company and The Brotherhood of Locomotive Firemen and Enginemen the agreement reached in mediation and covered by the National Mediation Board Docket Case No. A-905, which agreement reads as follows:

"(1) On each railroad party hereto the proportion of non-promotable firemen, and helpers on other than steam power, shall not exceed fifty percent in each class of service established as such on each individual carrier. This agree-

ment does not sanction on which non-promotable men are not now employed.

(2) The above percentage shall be reached as follows:

(a) Until such percentage is reached on any seniority district only promotable men will be hired.

(b) Until such percentage is reached on any seniority district all new runs and all vacancies created by death, dismissal, resignation or disqualification shall be filled by promotable men. A change in the starting time of the same run or job will not be considered as constituting a new run.

(3) Except as provided in items (2) (a) and (2) (b) men now holding seniority as firemen, or helpers on other than steam power, shall be permitted to exercise seniority in accordance with their seniority and the rules of their respective schedules.

(4) It is understood that promotable firemen, or helpers on other than steam power, are those who are in line for promotion under the present rules and practices to the position of locomotive engineer.

(5) It is understood and agreed that on any road having, in the opinion of its B. of L. F. & E. Committee, more favorable rules or conditions than above stipulated, such rules and conditions may at the option of such committee be retained in lieu of the above provision.

(6) All persons hereafter hired as firemen shall be required, in addition to showing, in the opinion of the management, reasonable proficiency, to take within stated periods to be fixed by management, but in no event to extend over a period of more than three years, two examinations to be prepared by management and to be applied to all alike to test their qualifications as firemen. A fireman failing to pass either examination shall have a second trial within three months.

Firemen hereafter hired declining to take or failing to

pass either of the examinations provided for in the preceding paragraph shall be dropped from the service.

Promotable firemen who pass the two examinations above referred to shall be required to take an examination for promotion to the position of engineer when they have had three and not more than four years of actual service. Upon passing such promotional examination and meeting all the requirements established by the carrier for the position of engineer, they shall, when there is need for additional engineers, be promoted to such position, and will establish a seniority date as engineer in accordance with the rules contained in the agreements on the individual railroads.

When rules for conduct of examinations for promotion are included in current schedules, such rules shall apply. In the absence of such rules firemen failing to pass will be given a second trial within a period of three months and if they fail to pass on the second trial will be given a third trial within a period of three months.

Promotable firemen declining to take examinations for promotion or who fail in their efforts to successfully pass the same, shall be dropped from the service.

All promotable firemen now in the service physically qualified, who have not heretofore been called for examination or promotion, or who have not waived promotion, shall be called in their turn for promotion. When so called should they decline to take such examination or promotion or fail to pass as herein provided, they shall be dropped from the service.

(7) It is expressly understood that in making this agreement representatives of the employees do not waive and are in no way prejudiced in the right to request agreements on the individual carriers here represented which will restrict the employment of helpers on other than steam power to promotable men; and it is agreed that this question is to be negotiated to a conclusion with the individual carriers.

(8) This agreement shall become effective February 22, 1941."

The committee representing the firemen requested that paragraphs 1 to 4 of the Mediation Board agreement quoted above be included as a part of this supplementary agreement as provided for in paragraph 5 of said agreement.

The definition and application of the phrases "—each class of service established as such—" contained in the first sentence of paragraph 1 as that the following constitute the classes of service to which paragraph 1 applied:

Passenger
Local Freight
Through Freight
Work, Ballast and Construction
Yard

The provision of paragraph 2 (b) is understood and agreed to mean that not in excess of 50 percent non-promotable men will be assigned to any class of service on any seniority district.

EXAMPLE 1

In case of only one assignment, in any class of service, on any seniority district, and such assignment is filled by a non-promotable fireman, in the event of the death, dismissal, resignation or disqualification of such non-promotable firemen the assignment would then be filled by a promotable fireman.

EXAMPLE 2

In case of 4 assignments in any class of service on any seniority district filled by one promotable and 3 non-promotable firemen, in the event of the death, dismissal, resignation or disqualification on one of the non-promotable firemen, the assignment would then be filled by a promotable fireman.

It is understood and agreed that the phrase "—non-

promotable fireman—" carried in paragraph 1 of the above quoted agreement refers only to colored firemen.

It is agreed that promotable firemen now in the service who are physically qualified and not otherwise restricted, who have heretofore been called for examniation for promotion and failed, or who have waived promotion, will be called for examination for promotion between May 1 and May 15, 1942. In the event such firemen fail to pass examination for promotion, or waive examination, their seniority as firemen shall not be affected.

Norfolk Southern Railroad Company. M. S. Hawkins and L. H. Windholz, Receivers, (signed) by J. C. Poe, Assistant to General Superintendent.

Accepted for the Firemen: (signed) G. M. Dodson, General Chairman, Brotherhood of Locomotive Firemen and Enginemen.

Raleigh, N. C., May 23, 1941.

AGREEMENT

BETWEEN THE

FRANKFORT & CINCINNATI RAILROAD COMPANY

and its

LOCOMOTIVE FIREMEN AND HELPERS

Represented by the

BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN

Covering rules governing the employment and assignment of Locomotive Firemen and Helpers.

Supplement to your current agreement covering wages and working conditions.
Effective September 1, 1940.

1. Only promotable men will be employed for service as

locomotive firemen or for service as helpers on other than steam power.

2. When new runs or jobs are established in any service, only promotable firemen or helpers will be assigned to them.

3. When permanent vacancies occur on established runs or jobs in any service, only promotable firemen or helpers will be assigned to them.

4. It is understood that promotable firemen, or helpers on other than steam power, are those who are in line for promotion under the present rules and practices to the position of locomotive engineer.

Duration of this Agreement

The rules and conditions herein, constitute an agreement, and shall remain in effect until changed in accordance with the provisions of the Railway Labor Act, as amended.

FOR THE FRANKFORT AND CINCINNATI RAILROAD CO.

/s/ W. F. Fowler
President.

FOR FIREMEN AND HELPERS

/s/ J. A. Crump
Chairman, Brotherhood of Locomotive Firemen and Enginemen.

Dated: Lexington, Kentucky, October 8, 1940.

FINAL ORDER FOR DECLARATORY JUDGMENT, INJUNCTION AND CONTINUING CAUSE FOR HEARING ON DAMAGES. (R. 33).

[Caption Omitted. See Complaint.]
(Entered January 21, 1947 by Sterling Hutcheson, Judge.)

This action came on to be heard on April 15, 1946

upon motions of all parties for summary judgment and plaintiff's motion to strike certain affidavits and exhibits filed herein, all of which motions were considered and fully argued April 15 and 16, 1946, and submitted to the Court; and the Court not being fully advised as to its judgment took time to consider. The Court now being fully advised as to its judgment, and having filed herein its memorandum opinion,

It is hereby ORDERED, ADJUDGED AND DECREED:

1.-a. That the motion to strike filed by plaintiff be, and it is hereby denied.

-b. That the motions of defendants Brotherhood of Locomotive Firemen & Enginemen, Ocean Lodge No. 76, Port Norfolk Lodge No. 775, and W. M. Munden for summary judgment be, and they are hereby denied.

-c. That the motion of defendant Norfolk Southern Railway Company for summary judgment be, and it is hereby denied.

-d. That the motion of plaintiff for summary judgment in behalf of himself and the class he represents be, and it is hereby granted.

2. That the rights, interests and legal relationships of the parties hereto, the classes they represent, and their privies are settled and declared to be as follows: That plaintiff and the class he represents are members of the craft or class of locomotive firemen employed by the defendant Norfolk Southern Railway Company; that the defendant Brotherhood of Locomotive Firemen & Enginemen is the exclusive representative of the entire craft or class of firemen employed by the defendant Railway for purposes of the National Railway Labor Act, and as such statutory representative is under the duty of representing non-union or minority union members of the craft or class without hostile discrimination, fairly, impartially, and in good faith; that in serving the Notice of March 28, 1940 (Ex-

hibit 1 to the complaint), negotiating the "Southeastern Carriers Conference Agreement," February 18, 1941, and the Supplemental Agreement of May 23, 1941, and in compelling the defendant Railway to remove plaintiff on or about October 10, 1941 from his assignment as locomotive fireman on a passenger run from Norfolk, Virginia, to Marsden, North Carolina under said "Southeastern Carriers Conference Agreement" and Supplemental Agreement, and to replace him with a Brotherhood member, the Brotherhood violated its statutory duties to plaintiff and the class he represents, and reaped a benefit from a contract that it was prohibited from making; that the said "Southeastern Carriers Conference Agreement" and Supplemental Agreement are null and void in so far as they deprive the plaintiff and the class represented by him of seniority and employment rights, that plaintiff and the class he represents are not bound thereby, and the Brotherhood, its members and defendant Railway are not entitled to take any benefits therefrom; that plaintiff was illegally displaced from his run and is entitled to be restored thereto.

3. That the defendant Brotherhood of Locomotive Firemen & Enginemen, Ocean Lodge No. 76, Port Norfolk Lodge No. 775, and W. M. Munden and the class they represent, and the defendant Norfolk Southern Railway Company, be and each of them hereby is perpetually enjoined from enforcing or otherwise recognizing the binding effect of said "Southeastern Carriers Conference Agreement" of February 18, 1941 or the Supplemental Agreement of May 23, 1941 in so far as said Agreement or Supplementary Agreement deprives plaintiff of his assignment on the passenger run between Norfolk, Virginia, and Marsden, North Carolina, or in any other way interferes with his occupation as a locomotive fireman employed by the defendant Railway or in any way interferes with the occupation of the class he represents as locomotive fireman employed by the defendant Railway.

4. That the defendant Norfolk Southern Railway Company be, and it is hereby directed to restore plaintiff to his seniority rights to apply for assignment to the run as locomotive fireman on the passenger run between Norfolk, Virginia, and Marsden, North Carolina from which he was illegally displaced on or about October 10, 1941, in accordance with the rules and working conditions governing locomotive firemen employed by it, irrespective of the alleged operation of said "Southeastern Carriers Agreement" and Supplemental Agreement, and the position of locomotive fireman on said run is hereby declared vacant if now held by a member of the defendant Brotherhood or other locomotive fireman with less seniority than plaintiff, should plaintiff desire to apply for assignment to said run.

Leave is reserved to any party in interest to apply for amendment, modification or enlargement of this order after reasonable notice.

(s) STERLING HUTCHESON,
United States District Judge.

January 21, 1947.